No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY TO BRIEF IN OPPOSITION

DONALD FRANCIS DONOVAN
(*Counsel of Record*)
CARL MICARELLI
CATHERINE M. AMIRFAR
BRUCE W. KLAW
JILL VAN BERG
EMMA C. PRETE
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022-3916
(212) 909-6000

Attorneys for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. This Case Is Not Moot. 2

II. *Sanchez-Llamas v. Oregon* Did Not Decide the Issues in This Case. 5

III. Texas's Challenge to Presidential and Federal Power Underscores the Need For Review. 7

CONCLUSION 10

TABLE OF AUTHORITIES

Federal Cases: PAGE

American Insurance Association v. Garamendi, 539 U.S. 396 (2003) 7, 8, 9

United States v. Belmont, 301 U.S. 324 (1937) .. 9

Head Money Cases (Edye v. Robertson), 112 U.S. 580 (1884)..... 7

Hines v. Davidowitz, 312 U.S. 52 (1940)..... 6

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 6

La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899) 8

Osborne v. Ohio, 495 U.S. 103 (1990) 10

United States v. Pink, 315 U.S. 203 (1942) 7

Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006).....*passim*

Testa v. Katt, 330 U.S. 386 (1947)..... 10

Younger v. Harris, 401 U.S. 37 (1971) 10

State Cases:

Torres v. State, 2005 OK CR 17, 120 P.3d 1184 (Okla. Crim. App. 2005)..... 8

International Cases:

Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), I.C.J. No. 128 (Mar. 31, 2004).....*passim*

PAGE

Constitutional Provisions:

U.S. CONST. art. VI 7, 9

Treaties and Federal Statutes:

28 U.S.C. § 2254(b)(1) 10

Statute of the International Court of Justice, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1031 ..... 6-7, 8

United Nations Charter, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1031 ..... 6, 8

Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ..... *passim*

State Statutes:

Texas Code of Criminal Procedure art. 11.071 .. 10

Other Authorities:

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) 8

ARGUMENT

Texas's Brief in Opposition ignores the fundamental reason to grant the writ: as the President of the United States has acknowledged, the United States has an obligation to comply with the *Avena* judgment, and he has acted to secure compliance. The Texas Court of Criminal Appeals, without contesting the United States' obligation, has challenged the President's authority to act. Hence, there can be no doubt that, if left unreviewed, the Texas court's decision will place the United States in breach of treaty obligations entered into on behalf of the nation as a whole and directly frustrate the President's decision to meet those obligations. No clearer case for review by this Court could be presented.

While Texas attempts to defend the merits of the result below (and does so largely on grounds that are at odds with what the Texas court actually decided), it fails to offer a single reason for its assertion that the case "does not warrant review." Br. Opp. 16. The state's arguments that it somehow accidentally complied with the *Avena* judgment in Mr. Medellín's case before the judgment was even issued, or that *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), should be extended to the circumstances of this case, or that the President exceeded his lawful authority, are irrelevant to whether this Court should grant certiorari. As the United States has explained in its *amicus* brief, the decision below has

> set a course that, if not reversed, will place the United States in breach of its international law obligation to comply with the *Avena* decision, leave unresolved the dispute between Mexico and the United States over the treatment of petitioner, and frustrate the President's judgment that foreign pol-

> icy interests are best served by giving effect to that decision.

U.S. Br. 9; *see also* Mex. Br. at 14. Nothing that Texas says detracts from that point in any way.

A state court should not have the final word on whether the United States as a nation abides by its treaty obligations. All the participants in this case—the United States, Mexico, Mr. Medellín, and Texas—recognize that the United States has a binding obligation, under treaties ratified by the President with the advice and consent of the Senate, to abide by the *Avena* judgment. Pet. 25-26. All, with the apparent exception of Texas, take the view that the United States should abide by this obligation. And no one disputes that the Texas court's decision stands in the way of the President's efforts to comply with that obligation. It is the unique role of this Court, as the final authority on questions of federal law, to protect the federal government's constitutional power to enter into enforceable treaties and to conduct the foreign relations of the United States without interference from the courts of the several states.

I. This Case Is Not Moot.

In its brief in opposition, Texas takes the remarkable position that the issues presented by this case are moot, because the Texas trial court's adjudication of Mr. Medellín's first state post-conviction application in 2001, some three years before the issuance of *Avena*, supposedly gave effect to the *Avena* judgment. Br. Opp. 13-14. Even if this theory could somehow be correct, it ignores the reason that this Court's review is needed in this case: the Texas court held that he could not be given review and reconsideration in the Texas courts, even though the court understood that the failure to provide

that review and reconsideration would constitute a breach of the United States' international treaty obligations with which the President had determined the United States would comply.

The decision by the Texas Court of Criminal Appeals in no way suggests that Mr. Medellín has already received the review and reconsideration required by *Avena*, nor does it make any pretense of complying with *Avena*. Rather, the Texas court expressly challenged the authority of the federal government to conduct the foreign relations of the United States by determining that the United States would comply with an ICJ decision in a case to which the United States was a party. Far from being moot, resolution of the issues presented in the Petition will determine not only whether Mr. Medellín, but also the 50 other Mexican nationals subject to the *Avena* judgment whose cases are currently pending in the courts of the United States, will receive the review and reconsideration to which the President, in accordance with *Avena*, has determined they are entitled.

In any event, Texas's claim that Mr. Medellín has already had "review and reconsideration" misunderstands the obligation imposed by *Avena* and the President's determination. The relief ordered by the President in order to give effect to *Avena* is unequivocally prospective. In fact, the so-called merits review of Mr. Medellín's Vienna Convention claim by the state trial court in 2001 was before the ICJ when the ICJ found that the United States must provide judicial "review and reconsideration" of Mr. Medellín's conviction and sentence as a remedy for the treaty violation in his case. *Avena* ¶¶ 121-122, 153(9) (Pet. App. 165a, 185a). The Texas trial court's findings of fact and conclusions of law from the state post-conviction proceedings in Mr.

Medellín's case were submitted to the ICJ, and the parties discussed the trial court's disposition, as well as the subsequent CCA appeal and federal habeas proceedings in their briefing. *See* Brief Amicus Curiae of the Government of the United Mexican States at 23, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). On this record, the ICJ rejected the argument of the United States that it was already in compliance with the required remedy, and concluded that the United States was still required to give "review and reconsideration" to Mr. Medellín and 50 other Mexican nationals. *Avena* ¶¶ 130-134, 153(9) (Pet. App. 169a-171a, 185a) (emphasis added). Thus, Texas's suggestion that Mr. Medellín has already been given the remedy required by the *Avena* judgment is, on its face, inconsistent with the *Avena* judgment. The President's determination also makes clear that prospective relief is required, stating that the United States "*will* discharge" its obligations under *Avena* by giving them effect in state court; not that it has already done so. Pet. App. 187a (emphasis added).

Even were it somehow open to the Texas courts to consider whether Mr. Medellín has already received the required review and reconsideration, Texas's argument would fail, because the truncated review of Mr. Medellín's Vienna Convention claim by the Texas trial court in 2001 fails to comport with the requirements of *Avena*. The Texas trial court denied Mr. Medellín *any* opportunity to develop the factual record underlying the violation. *See* Order, *Ex parte Medellín*, No. 675430-A (Tex. 339th Dist. Ct. Jan. 22, 2001), reprinted in Appendix to Petition for Writ of Certiorari, 34a, *Medellín v. Dretke*, 544 U.S. 660 (hereinafter "First Pet. App."); *see also* First Pet. App. 61a. Moreover, the ICJ held that it is "crucial" that the review and reconsideration take

account of the treaty violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right. *Avena* ¶ 139 (Pet. App. 174a). Yet, contrary to Texas's post-hoc gloss on the Texas trial court's decision, the trial court's consideration of Mr. Medellín's Vienna Convention claim conflated the treaty and constitutional claims by considering only whether the treaty violation resulted in a violation of Mr. Medellín's *constitutional* rights. First Pet. App. 56a-57a.[1]

II. *Sanchez-Llamas v. Oregon* Did Not Decide the Issues in This Case.

Texas also argues that this Court's decision in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, somehow resolved the issues in this case. Br. Opp. 14-16. Here again, Texas makes a merits argument that fails to address the issue here: whether this Court could leave unreviewed a Texas judgment that would put the United States in breach of its acknowledged treaty obligations and frustrate the President's decision that the United States would comply.

In any event, as the United States points out, *Sanchez-Llamas* plainly did not address the issues presented. U.S. Br. 20; Pet. 26-27. In *Sanchez-Llamas*, this Court considered the degree of deference due to *interpretations* of a treaty in prior ICJ cases cited *as precedents*. Here, by

[1] The United States made the same point in the oral argument before the Texas Court of Criminal Appeals: "Because previously, the only analysis that I see that was made [by Texas courts] is whether the Vienna Convention violations produced constitutional violations. . . . That does not give full and independent weight to the treaty violation, which is what *Avena* requires and which is what the President has directed." Transcript of Oral Argument, vol. I, at 48-49, *Ex parte Medellin*, No. AP-75,207 (Tex. Crim. App. Nov. 15, 2006).

contrast, the issue is what constitutional mechanisms allow the United States to abide by its undisputed treaty obligation to comply with an ICJ *judgment* itself, regardless of whether the United States courts agree with the interpretation on which the ICJ based its judgment. This Court did not decide the latter question in *Sanchez-Llamas*, because the petitioners in that case were not among the 51 Mexican nationals whose cases were adjudicated by name in *Avena*.

Texas contends that this distinction is irrelevant because ICJ decisions are binding only "between the parties," and "[n]either Medellín nor the State of Texas were parties [*sic*] to the *Avena* decision." Br. Opp. 16. Texas is mistaken.

First, "[i]n international relations . . . the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979) (internal quotation marks omitted); *see also* Pet. 19-20. And the Mexican government, as claimant, represented not only its own rights but also those of Mr. Medellín and the other Mexican nationals whose cases were before the ICJ. *Avena* ¶¶ 38-40 (Pet. App. 124a-127a); *see, e.g., Hines v. Davidowitz*, 312 U.S. 52, 64 (1940) (government has responsibility for "protection of the just rights of a country's own nationals" abroad). Thus, for purposes of the United States' treaty obligation to comply, Texas and Mr. Medellín *were* parties to the *Avena* judgment.

Second, in any event, Texas's attempt to reframe the issue as solely a question of *res judicata* between the *Avena* parties misses the point. The United States has a binding obligation, under treaties ratified by the President with the advice and consent of the Senate, to abide by the *Avena* judgment. *See* U.N. Charter art. 94; ICJ

Statute arts. 59-60; *see also* Pet. 24-25. By the Supremacy Clause, those ratified treaties are "the supreme Law of the Land" in the same manner as federal statutes. U.S. CONST. art. VI; *see also, e.g., Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 599 (1884). And under the *Avena* judgment, the United States is required to give "review and reconsideration" to the convictions and sentences of Mr. Medellín and the other 50 Mexican nationals in their own cases. *See, e.g., Avena*, ¶¶ 121, 141 (Pet. App. 165a, 174a). To the extent a Texas state criminal procedure statute stands as an obstacle to the nation's compliance with this treaty obligation, it is preempted by operation of the Supremacy Clause. *See, e.g., United States v. Pink*, 315 U.S. 203, 230-31 (1942).[2]

Finally, in this case, the President has acted to give effect to the United States' undisputed treaty obligation to abide by the *Avena* judgment. Texas, however, has claimed a right to defy the federal government's foreign relations authority. Again, Texas's stance is preempted under the Supremacy Clause. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003).

III. Texas's Challenge to Presidential and Federal Power Underscores the Need For Review.

Texas also attempts to defend the merits of the Texas court's ruling that the President exceeded his constitu-

[2] Texas points out that the UN Charter provides for Security Council referral if a nation does not voluntarily comply with its obligations under an ICJ judgment. Br. Opp. 16. However, the question in this case is not what happens internationally if the United States breaches its obligations, but rather what mechanism the United States Constitution provides domestically to allow the United States to comply with those obligations. The latter question is a question of United States constitutional law rather than treaty interpretation, and it is not a question that the Court answered in *Sanchez-Llamas*.

tional and statutory authority in directing that the *Avena* judgment should be given effect in state courts. Again, Texas's argument only serves to confirm the reasons for a grant of certiorari on the petition. Where, as here, a state court has held unconstitutional an exercise of federal power in the area of foreign relations, review by this Court is imperative to resolve the federal-state conflict and to ensure "uniformity in this country's dealings with foreign nations," *Garamendi*, 539 U.S. at 413, regardless of the ultimate outcome.[3]

In any event, Texas again is wrong on the merits. Its argument rests not only on the mistaken notion that *Sanchez-Llamas* held that ICJ judgments have no effect in U.S. courts, *see supra* Part II, but also on the further leap that the relevant treaties do not constitute federal law that the President can implement. Texas fundamentally misunderstands the nature of treaty obligations.

Nations enter into treaties intending to be bound by their promises. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 321 cmt. a (rule that treaties shall be obeyed [*pacta sunt servanda*] "lies at the core of the law of international agreements and is perhaps the most important principle of international law"). Likewise, nations agree to adjudication before international arbitral or judicial bodies intending to be bound by the result. *See, e.g., La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899); *see also* UN Charter art. 94; ICJ Statute arts. 59-60. While a foreign nation

[3] Moreover, though Texas fails to acknowledge it, Oklahoma's highest court has granted review and reconsideration under *Avena* to a Mexican national named in the *Avena* judgment. *See Torres v. State*, 2005 OK CR 17, 120 P.3d 1184 (Okla. Crim. App. 2005) (cited in Pet. 29). At a minimum, review is appropriate to resolve this split in authority.

may take "diplomatic or political" actions (Br. Opp. 22), among others, in response to a breach of these legal obligations, that fact does not deprive the obligations of their binding or legal character. The Supremacy Clause incorporates these international legal obligations into United States domestic law, by providing that "*all* Treaties" made by the United States are the "supreme Law of the Land." U.S. CONST. art. VI (emphasis added). Texas's attempt to recast compliance with this legal obligation as a mere courtesy to a foreign government is baseless.

Moreover, as explained in the petition, Congress has authorized the President to carry into effect judgments of the ICJ to which the United States was a party. Pet. 21-22.

Texas also has no basis for its suggestion that an additional executive agreement would be needed for the President to give effect to an already acknowledged obligation under an existing, ratified treaty. The United States does not need Mexico's permission to do what, by constitutionally prescribed treatymaking processes, it has already agreed to do. *See* U.S. Br. 17; Mex. Br. 7-10. And in any event, though Texas ignores it, such an executive agreement is effectively in place. Both the United States and Mexico have agreed that the United States is required to grant review and reconsideration in accordance with the *Avena* judgment, and that review in state court is an acceptable way to accomplish at least part of this obligation. *See* U.S. Br. 7-8; Mex. Br. 6-7, 10. No formalities are needed for an Executive Agreement; as petitioner has noted, this Court has inferred such an agreement from exchanges of correspondence or even from the congressional testimony of Executive Branch officials. Pet. 23 (citing *Garamendi*, 539 U.S. at 421-23, and *United States v. Belmont*, 301 U.S. 324, 326 (1937)).

Here, the agreement is evident from the *amicus* briefs that both governments have filed with this Court.

Finally, Texas's suggestion that the United States has unconstitutionally interfered with the operations of the state courts is without merit. Texas's own laws authorize its courts to hear habeas corpus petitions to review convictions and sentences. *See* Tex. Crim. Pro. Code, art. 11.071. Far from intruding on state sovereignty, allowing state courts to resolve federal issues in the state criminal process has always been viewed as a sign of "proper respect for state functions." *Younger v. Harris*, 401 U.S. 37, 44 (1971); *see also* 28 U.S.C. § 2254(b)(1) (requiring exhaustion of remedies in state court before filing federal habeas). Conversely, a state court must show proper respect for federal law, and it may not refuse to exercise jurisdiction based on an unwillingness to enforce federal law. *See Testa v. Katt*, 330 U.S. 386 (1947). While state courts ordinarily are free to follow their own procedures, they may not do so where, as here, the procedure itself is inconsistent with a federal right or eliminates any reasonable opportunity to assert the federal right. *See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990). In any event, the stark federal-state conflict that Texas posits only illustrates the need for this Court to grant review.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant a writ of certiorari.

Respectfully submitted,

DONALD FRANCIS DONOVAN
(Counsel of Record)
CARL MICARELLI
CATHERINE M. AMIRFAR
BRUCE W. KLAW
JILL VAN BERG
EMMA C. PRETE
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022-3916
(212) 909-6000

Attorneys for Petitioner

April 4, 2007